

## THE INHERITANCE (PROVISIONS FOR FAMILY AND DEPENDANTS) ACT, 1993

### BACKGROUND

The Inheritance (Provision for Family and Dependents) Act was passed by Parliament in May 1993 and came into immediate effect. This Act belongs to the category of legislation referred to as testator maintenance legislation or family provision legislation. The object of such legislation is to ensure that the family and dependants of a deceased person are not left without some provision for their maintenance if the deceased's estate can provide this. This Act has made a significant inroad into the principle of freedom of testation which, up until the enactment of this Act, applied in full force in Jamaica. This meant that prior to the Act, it was possible for a person to make a will which either ignored, or failed to provide adequately for, the needs of his family or dependants; and where this occurred the family members or dependants had no recourse in law, regardless of the size of the estate left behind by the deceased.

It is unusual to find testamentary freedom existing in such an unrestricted form today. Testamentary freedom is an incident of property rights. Generally, in the context of family relations there has been a movement away from the strict observance of the property rights of the individual towards the recognition of a community of interests in property. This is evident e.g., in the modern approach to the division of property between spouses upon the breakdown of marriage. More particularly, in the area of succession, testamentary freedom has given way to family duty. The thinking is that a person's duty towards his family overrides any personal rights he may have in property. It is usual, therefore, for some restriction to be imposed on the power of testation to secure adequate provision for the family of the deceased. The restriction takes various forms, but there are two basic systems. One system entitles certain family members, usually a surviving spouse and children, to fixed rights in the deceased's estate. This system applies in Scotland and in civil law jurisdictions. It derives from the "legitimate portion" of

Roman law, under which the wife and children were entitled to a prescribed fraction of the husband's property upon death. The system which applies in Barbados under The Succession Act 1975 is a variant of this - it gives to the surviving spouse and children of the deceased a legal right to a fixed share in the deceased's estate which takes priority over devises, bequests and shares on intestacy.<sup>1</sup> The other system allows the court, on the application of a dependant, to make reasonable provisions for the maintenance of that dependant out of the estate if it is satisfied that the deceased's will made no provision or inadequate provision for that dependant. This is the system which is applicable in England and some common law jurisdictions.<sup>2</sup> This system became a part of English law by virtue of the enactment of the Inheritance Family Provision Act in 1938. The first half of the present century saw much legislative activity in family law<sup>3</sup> and many of the Acts introduced into England during that time were adopted in Jamaica. The omission of the Inheritance Family Provision Act is curious. It appears, from the Parliamentary records, that in 1956 an attempt was made to introduce similar legislation in Jamaica, but the Bill was withdrawn. Some twenty years later, in 1975 to be exact, the Law Reform Committee recommended the enactment in Jamaica of legislation based on the English Act of 1938. In that same year, however, the 1938 Act was repealed and replaced by The Inheritance (Provisions for Family and Dependants) Act, 1975. The new Act introduced some significant changes - these relate mainly to the widening of the categories of eligible applicants and the types of orders which the court may make. I should point out that The Act which was enacted by the Jamaican Parliament last year although similarly entitled, is not identical to the English Act. This should be borne in mind as it has implications for the usefulness of the English decisions, in particular the decisions under the new Act, in interpreting the Jamaican Act.

## **THE PROVISIONS OF THE ACT**

### **Objective**

The objective of the Act is indicated by its long title - "An Act to make reasonable financial provision for the family and dependants of a deceased person out of the estate of the deceased

person where the disposition of the deceased's estate effected by his will and the law relating to intestacy or the combination of his will and that law is not such as to make reasonable financial provision for the maintenance of his family and dependants, and to provide for matters connected therewith or incidental thereto".

### **Application of the Act**

The provisions of the Act apply to deaths occurring after its coming into effect.

### **Persons for whom provision may be made**

Section 4 of the Act specifies the persons who may apply for family provision. These are:

- (1) The wife or husband of the deceased - this includes a person who in good faith entered into a void marriage with the deceased, provided that the marriage was not annulled during the lifetime of the deceased, or that person has not entered into a later marriage;
- (2) a child - note that "child" here means primarily a child under 18 years old, but the age limit is increased to 23 years where the child is pursuing a course of studies or training, and waived altogether where there are "special circumstances". Physical and mental disabilities qualify as special circumstances.<sup>4</sup> It should be noted also that "child" here has the same meaning as "relevant child" under the Matrimonial Causes Act - i.e it includes an adopted child, an unborn child and a child of the deceased's spouse who was accepted as one of the family.<sup>5</sup>
- (3) a parent of the deceased who was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before his death; - "parent" includes a person who was "in loco parentis" to the deceased immediately before his death.<sup>6</sup>

- (4) a former wife or former husband of the deceased, who was being maintained wholly or partly or who was entitled under an existing order of court of competent jurisdiction or under an agreement between the parties to be maintained wholly or partly by the deceased immediately before his death; (An order for the making of periodic payments to a former spouse ceases upon the remarriage of the former spouse <sup>7</sup>.)
- (5) a person who -
  - (i) where the deceased was a single man, was a single woman who was living with the deceased as his wife for a period of not less than five years immediately preceding the date of the deceased's death; or
  - (ii) where the deceased was a single woman, was a single man who was living with the deceased as her husband for a period of not less than five years immediately preceding the date of the deceased's death; and
- (6) an administrator of the estate on behalf of a person who is a minor or who lacks mental capacity.

The categories of applicants reflect the modern trend in legislation of this nature to recognise not only persons in respect of whom the deceased had a legal support obligation during his lifetime, but also persons in respect of whom he may be said to have had a moral obligation. The various Acts apply different eligibility tests.

Some Acts apply the "dependence" test. This approach is exemplified by the English Act of 1975 which permits an application by any person "who immediately before the death of the deceased, was being maintained, either wholly or partly by the deceased."<sup>8</sup> In order to qualify under this provision the applicant must establish that the deceased, other than for full consideration, was making a substantial contribution in money or money's worth towards his or her reasonable needs

immediately before his death.<sup>9</sup> It is in this class of applicants that a de facto spouse or mistress falls. The "dependence" test under the English Act has been criticised as being too vague. Additionally, the requirement for proof of substantial contribution by the deceased other than for full consideration has given rise to interpretational difficulties which in turn have created some uncertainty as to which persons qualify as applicants in this category.<sup>10</sup>

The legislation of some other countries identify persons who had a specific familial relationship with the deceased, such as a grandchild, a child of the deceased's spouse or a dependent member of the deceased's household, or a de facto spouse.<sup>11</sup> The various formulations used to define a de facto spouse are interesting. The South Australian legislation allows an application by a "putative spouse". A "putative spouse" in this instance is a person who was cohabiting with the deceased as his or her husband or wife, as the case may be, continuously for a period of five years immediately preceding the date of death, or for a period aggregating not less than five years during the period of six years immediately preceding the date of death, or a person who had had sexual relations with the deceased resulting in the birth of a child.<sup>12</sup> The Succession Act, 1977 of Ontario allows claims by a person who cohabited with a deceased for a period of five years immediately preceding his death, or in relationship of some permanence where there is a child born of whom they are the parents. The Succession Act 1975 of Barbados defines a dependant to include a woman (other than his spouse) who was living together with a man as his wife immediately preceding the date of his death and was wholly or mainly maintained by him, and also a man (other than her spouse) who was living together with a woman as her husband immediately. It should be noted that the Barbados Act applies to intestacy only, as the interests of the family where there is a will is secured by fixed entitlements. It should be noted, also, that "spouse" for this purpose includes single persons cohabiting for five years, so that the provision for maintenance out of the deceased's estate applies only to cohabitants who do not qualify as "spouse".

The Jamaican Act follows the approach of restricting the right to apply for family provision to persons with whom the deceased had a specific relationship. The eligibility criteria for a de facto or common law spouse are the same as those which apply under the Intestates' Estate and Property Charges Act.

### **Ground for Application**

The ground on which an application may be made to the court is that the disposition of the deceased' estate effected by his will or the law relating to intestacy or the combination of his will and the law relating to intestacy, is not such as to make reasonable financial provision for the maintenance of the applicant. The court will only make an order in favour of the applicant if it is satisfied that the disposition of the deceased's estate does not make reasonable provision for the maintenance of the applicant. (S.6) There are two important points to note. (1.) In determining whether reasonable financial provision has been made for the applicant, the court must consider the circumstances existing *at the time of the hearing of the application*. This allows the court to take into account any change in circumstances which has arisen since the date of the death of the deceased. A provision to a similar effect is to be found in S.3 (5) of the English Act. This was introduced to settle the question which under the 1938 Act as to the proper date for assessing the relevant circumstances. (2). The standard of reasonable financial provision is *maintenance*. This is the standard which applies to all applicants. This is one of the important differences between the Jamaican Act and the English Act. Under the English Act there are two different standards of reasonable financial provisions. The maintenance criterion applies to all applicants except a surviving spouse. In the case of the surviving spouse, the standard applicable is "such financial provision as it would be reasonable in all the circumstances of the case, *whether or not that provision is required for his or her maintenance*".<sup>13</sup>

In determining whether reasonable provision has been made for the maintenance of the applicant, and the extent to which, and the nature of, the obligations which the deceased had towards any

applicant, the physical or mental disability of any applicant or beneficiary, the deceased's reasons for not making provision for any person in his will, the conduct of the applicant towards the deceased, the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime and any other matter which the court may consider relevant.

Additionally, where the application is made by or on behalf of a child, the court is required to have regard to the manner in which the child was, or is expected to be, educated or trained. In the case of an application in respect of a child of the family, the court must also have regard to the extent to which the deceased had assumed responsibility of the child's maintenance.

It will be observed that the court is to be guided by the same considerations which apply to ordinary maintenance proceedings. As this is a case of maintenance after death, the court must balance the interests of the beneficiaries and those of the applicants. Some of the factors stipulated in the guidelines speak to this. Each application will depend on the particular facts. I would think, having regard to the significant increase made to the entitlement of a surviving spouse on intestacy as a result of the amendment to the Intestates' Estate and Property Charges in 1988, that claims by widows and widowers are more likely to be made where the deceased left a will. It is still early days yet. I have not been able to discover whether any applications have been made under the Act. It will be interesting to see what pattern will emerge. In the meantime, the decisions under the English Act provide some insight into the judicial approach to applications under legislation of this nature. The following principles which emerge from the English decisions are of interest.

1. The test for reasonable provision has been the subject of conflicting decisions. In some cases under the 1938 Act the court has held that an order could be made only if the deceased had acted unreasonably in not making any provision or a larger provision for the

dependant, i.e., a subjective test was applied.<sup>14</sup> In other cases, the court held that the question was whether the provision made by the deceased for the applicant was in fact reasonable, not whether the deceased acted unreasonably.<sup>15</sup> It now appears to be settled that the latter approach is the correct one.<sup>16</sup>

2. Maintenance does not mean mere subsistence.<sup>17</sup>

3. Where the estate is so small as to be incapable of providing maintenance, so that the claim really amounts to an effort to obtain a legacy, the court will refuse the application<sup>17</sup>

### **Time for applications**

Except where permission is given by the court, an application must be made within six months from the date on which representation with respect to the estate of the deceased is first taken out.<sup>19</sup> Someone asked whether an application may be made before the grant of probate. The answer is yes. There is a decision on the comparable provision in the 1938 English which provides authority for the view that an application made before the grant of Probate has been made is valid if a grant is obtained before the hearing and no objection on the ground of irregularity has been made before that time. As Roxburg J. pointed out in that case<sup>20</sup> the purpose of the section is to prevent an application from being made too late, when parties have altered their position in the face of the dispositions made by the testator. He thought it improbable that Parliament was ever thinking of applications which might be too soon.<sup>21</sup> While on the point of time for making an application, it is convenient to note that the personal representatives are protected from liability for distributing any part of the estate after six months from the date on which representation is first taken out.<sup>22</sup> This is without prejudice to the right to recover, by reason of the making of an order, any part of the estate so distributed.

### **Orders which the court may make**

The court may make provision for the maintenance of the applicant out of the deceased's estate by way of any or more of the orders referred to in Section 6.<sup>23</sup> Briefly, these are an order for



periodical payments, lump sum, transfer of property, settlement, variation of settlement, acquisition of property for transfer or settlement. An order may contain such consequential and supplemental provisions as the court thinks necessary or expedient for giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary and another, and the court may attach to any order such conditions as it thinks fit.

The court is also empowered to make an interim order in cases where the applicant is in immediate need of financial assistance, and property can be made available to provide such.<sup>24</sup> In making an interim order the court should be guided, as far as possible, by the considerations which apply in the case of a final order. Payments made pursuant to an interim order may be treated as having been paid on account of money payable under a final order.

#### **Variation of orders**

The court may, on application, vary, discharge, suspend or revive an order for periodical payments. An application may be made by any person who may apply for family provision, the personal representative of the deceased, the trustees of any relevant property or any beneficiary of the deceased. A variation order may only affect property, the income of which is applicable wholly or partly for the making of periodical payments. In exercising its power of variation the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order. A lump sum order may not be varied as to the total amount, but only as to the number, amount and due date of instalments payment., and in this case an application may be made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable.<sup>25</sup>

## **Jurisdiction**

### **(i) Court**

Jurisdiction under the Act is exercisable by the court which has jurisdiction over the probate of the will or administration of the estate or both of the deceased.<sup>26</sup>

### **(ii) Basis for jurisdiction**

The jurisdictional basis of the court is indicated in the definition of "property". Property is defined as "all property (whether moveable or immoveable) - (a) in Jamaica or elsewhere, where the deceased was domiciled in Jamaica; or (b) in Jamaica, where the deceased was not domiciled in Jamaica".<sup>27</sup> This definition has the effect of conferring on the court jurisdiction over all the property, wherever located, of a deceased who died domiciled in Jamaica; and over all the property, located in Jamaica, of a deceased who was domiciled in another country. The court can therefore assume jurisdiction on two bases 1) the domicile of the deceased; and 2) the situation of property in Jamaica, regardless of the deceased's country of domicile. This is a departure from the general conflict of laws rule which founds jurisdiction, in the case of moveable property, on the fact that the deceased was domiciled in the country in question, and in the case of immoveable property, on the situation of the property in the country.

The departure from the conflict of laws rule is not unusual. The English Act bases jurisdiction on the domicile of the deceased in England and Wales at the time of death.<sup>28</sup> This domicile based jurisdiction has been criticised as being too limited.<sup>29</sup> It can in fact lead to an anomalous situation where the deceased was domiciled in another country and died leaving land in England and Wales, and the courts of the deceased country of domicile is unable to assume jurisdiction in respect of the land. This will be the case if the law of the deceased's country of domicile follows the general conflict of laws rule which you will recall, is that foreign immovables are governed by the *lex situs*. In this case the courts of neither of the two countries having the closest connection with the deceased and the land have jurisdiction to apply family provision legislation.

It is for this reason that the current thinking favours the approach taken in the Australasian jurisdictions which is exemplified by The Inheritance (Family Provision) Act, 1972 -1975 of South Australia . That Act gives the court jurisdiction over the estate of a person who has died domiciled in the state or owning real or personal property in that state.<sup>30</sup> The Jamaican Act follows this approach. The intention is to give the court the widest access to property from which to make maintenance provision for the dependants of the deceased. It is possible that moveables in Jamaica could be affected by contradictory orders of the deceased's country of domicile. However, it is believed that in practice problems of this kind might be rare, and if they occur the court can be expected to refuse to make an order or to adjourn the hearing of the application until that possibility is resolved. In some cases, also, it may be impractical for the court to make an order affecting property which is located outside the country even though this is within its jurisdictional competence. In such a case the court may elect to deal with such property over which it can exercise control.

### **Property available for a Family Provision**

Where the court is satisfied, on an application, that reasonable financial provision has not been made for the maintenance of the applicant, it may order that such provision be provided out of the **net estate** of the deceased. Section 2 defines the "net estate" as

- (a) property which the deceased had power to dispose of by his will less funeral, testamentary and administrative expenses, debts and liabilities. It is to be noted that for this purpose, a person who is not of full age or capacity shall be treated as having the power to dispose of by will property of which he would have had power to dispose by will if he had been of full age and capacity.
- (b) other property, including any sum of money which is treated for the purposes of the Act as part of the net estate of the deceased;
- (c) other property, including any sum of money which was the subject of a disposition that was set aside by the court.

The last mentioned requires further explanation, but before dealing with that, it is important to note is that the property which is available for family provision under the Jamaican Act is more limited than that which is available under the comparable English Act. Under The English Act, such property includes property which was the subject of a nomination made by the deceased, property which was the subject of a donatio mortis causa, and property which was held by the deceased on joint tenancy with some other person. (S. 8-S.9) The extension of the "net estate" to include such property was one of the new features introduced by the 1975 Act.

### **Power of the court to set aside transactions**

To return now to the third category of property referred to as part of the net estate, the power of the court to set aside transactions is dealt with in Sections 13 through to 15 of the Act. The Act contemplates two types of transactions - dispositions made by the deceased within one year of his death and contracts made by the deceased to leave property by his will or for the payment of money or transfer of property by his personal representatives. The court will only disturb such transactions if it is satisfied on a balance of probabilities that the deceased acted with the intention of defeating an application under the Act, and that full valuable consideration was not provided. Additionally, in the case of a disposition, the court must be satisfied that the person to whom it was made did not act in good faith and had notice of the deceased's intention to defeat an application for family provision.<sup>31</sup> If the court is so satisfied, it may direct the donee of the property, which was the subject of the disposition or contract, to provide the funds from which financial provision can be made for the maintenance of the applicant. A donee's liability in this respect is limited to the amount of or value of the benefit he received. The Act authorises a personal representative of the deceased, if he has reason to believe that a contract was made with the intention to defeat an application for family provision, to postpone the payment of money or transfer of property required by the contract until the time limit for bringing an application has passed, or where an application is made before that time, until the matter is determined.<sup>32</sup>

Provisions of this nature are a common feature of family provision legislation.<sup>33</sup> The courts ability to make financial provisions for a dependant depends on the availability of a sufficient estate from which such provisions can be made. It follows that the Act would be ineffective if a person were to be able to put his property beyond the reach of the court by deliberately disposing of it before his death.

### **Effect of Orders**

An order made under the Act takes effect from the date of the death of the deceased.<sup>34</sup> A copy of every order must be registered and filed by the Clerk or Registrar of the court, and a memorandum of the order must be endorsed on, or affixed to the probate or letters of administration granted in relation to the estate.

### **Conclusion**

Although the provisions of the Jamaican Act are in some respects less extensive than the 1975 English Act, it is essentially a modified version of the English Act. The English cases will therefore be instructive, particularly in relation to those provisions which are common to both Acts. The main areas of differences to be borne in mind are those relating to the jurisdictional basis, the category of eligible applicants and the property which is available for family provision.

From a practical viewpoint, lawyers now need to bring to their clients' attention the provisions of the Act when advising on the making of a will, so as to anticipate or avoid, where possible, future claims against the estate. It might be useful also to make a record of the advice given in "tricky" situations, and to file this advice away safely with a copy of the will.

Eileen Boxill  
July 9, 1994

## NOTES

1. Section 2
2. For a discussion of the various systems see 73 L.Q.R. 74-88
3. E.g. The Matrimonial Causes Acts, 1923, 1937; The Adoption Act, 1926; The Guardianship of Infants Act, 1926
4. Section 2
5. Matrimonial Causes Act, Section 2
6. Section 2
7. Section 12
8. Section 1(e) See also the Succession Act of Trinidad and Tobago S.95 1(e)
9. Section 1(3)
10. See commentary by Alec Samuel in 39 M.L.R. 183-186; Re Wilkinson [1978] 1 All E.R. 221; Jelley v. Iliffe [1980] Ch. 444, [1981] 2 All E.R. 29
11. See e.g. N.S.W. Family Provision Act, 1982, S. 6(1), S. Australia Inheritance (Family Provision) Act, 1972-1975, S.6
12. The Inheritance (Family Provision) Act, 1970-1975, S.7 (1)
13. Section 1(2)(a) This standard was introduced by the 1975 Act. Previously, under the 1938 Act, the maintenance standard applied to all applicants
14. Re Styler (1942) Ch. 387; Re Inns [1947] Ch 476; Re E [1966] 1 WLR 709
15. Re Goodwin, [1969] 1 Ch. 283; Re Gregory [1970] 1 WLR 1455
16. This position was confirmed by the Law Reform Commission in their Second Report on Family Property: Family Provision on death Law Com. No. 61; see also discussion of conflicting decisions in 64 LQR 19
17. Re Borthwick, Borthwick v. Beavais [1949] 1 All E.R. 472
18. Re Vrint, Vrint v. Swain [1940] 3 All E.R. 470; See also note in 73 LQR 78-88
19. Section 5
20. Re Searle, Searle v. Siems [1948] 2 All E.R. 426
21. See note in 64 LQR 448
22. Section 17
23. "Net Estate" covers real and personal property less funeral, testamentary and administration expenses Section 2
24. Section 8
25. Section 11
26. Section 2
27. Section 2
28. Section 1
29. Breslauer, (1939)1 Mod. L.R. 306; Morris (1964) 62 LQR 170
30. Section 7 (1)(a)
31. Section 13
32. Section 17(2)
33. c.f. English Act 1975, S. 10-S13
34. Section 19